IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-6766

CARL ALBERT COLLINS — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR PETITIONER

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Arkansas entered on December 22, 1975, rehearing denied, January 19, 1976.

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 259 Ark. 8, 531 S.W. 2d 13 (1975). It is reproduced in Appendix "A" to this Petition, pp. 1A-7A, infra.

JURISDICTION

The opinion of the Supreme Court of Arkansas was rendered December 22, 1975. That Court entered final judgment upon denying rehearing January 19, 1976, a copy of which appears in Appendix "C". The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1275 (3).

QUESTIONS PRESENTED

1. Whether the punishment of death imposed upon the Petitioner as provided by Act 438 by the State of Arkansas violates the Eighth Amendment prohibition against cruel and unusual punishments because of jury sentencing discretion and

the lack of appellate review provisions to insure nonarbitrary application of the death penalty.

2. Whether the sentence of death imposed upon the Petitioner violates Petitioner's fundamental right to life guaranteed by the Fourteenth Amendment to the United States Constitution and the Petitioner's fundamental right to be protected from cruel and unusual punishments guaranteed by the Eighth Amendment to the United States Constitution.

3. Whether the electrocution method of execution imposed upon the Petitioner is in violation of the Eighth Amendment of the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required, nor excessive fines imposed, no cruel and unusual punishments inflicted."

This case also involves the Fourteenth Amendment to the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It involves Act 438 of 1973 passed by the Arkansas Legislature and codified in Ark. Stat. Ann. §§41-4701 et seq. (Supp. 1973), which provides:

> 41-4701. Categories of felonies.--Felonies are classified for the purpose of sentence, and for any other purpose specifically provided by law, into the following categories:
> (a) capital felony;
> (b) life felony without parole;
> (c) life felony; and
> (d) felony. [Acts 1973, No. 438, §1, p.___.]

> 41-4702. Capital felonies--Definitions.--The following crimes shall be capital felonies punishable as provided in Section 6 [§41-4706] hereof:
> (A) The unlawful killing of a human being when committed by a person engaged in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, kidnapping, or mass transit piracy;
> (B) any person convicted of treason as now defined by law;
> (C) the unlawful killing of a policeman or any other law enforcement officers, jailer, prison guard or any other prison official, fireman, a judge or any other court official, probation officer, parole officer, military personnel, when any such person so killed is acting in the line of duty, and when such killing is perpetrated from a premeditated design to effect the death of the person killed or of any other human being;
> (D) the unlawful killing of two (2) or more human beings when perpetrated from a premeditated design in the course of the same act to effect the death of the persons killed or any other human being;
> (E) the unlawful killing of any public official or any candidate for public office from a premeditated design to effect the death of the person killed or of any other human being; and
> (F) the unlawful killing of any person by a person who is already under sentence of death or of life in the penitentiary.
> As used in subsection (A) of this section, the term "mass transit piracy" shall mean the seizing or exercising of control by force or threat of violence, without lawful authority and with wrongful intent, of any vehicle with a seating capacity of more than eight (8) passengers operated by a common or contract carrier of passengers for hire, containing a non-consenting person or persons within this State.
> As used in this Act [§§41-4701--41-4716], the term "public official" as used in the subsection (E) of this section, shall mean any person holding a public office which, under the constitution or laws of this State, is filled by election. [Acts 1973, No. 438, §2, p. ___.]

> 41-4703. Life felony without parole.--When any person shall be convicted of any capital felony listed in Section 2 [§41-4702] hereof, and the jury in its discretion finds mitigating circumstances as set forth in Section 12 [§41-4712] and determines that these mitigating circumstances preclude the imposition of death by electrocution, then such crime shall be a life felony without parole and shall be punishable as provided in Section 7 [§41-4707] hereof. [Acts 1973, No. 438, §3, p. ___.]

41-4704. Life felonies.--All other offenses for which life imprisonment or death in the electric chair is presently prescribed by Arkansas law shall be life felonies and shall be punishable as provided in Section 8 [§41-4708] hereof. [Acts 1973, No. 438, §4, p. ___.]

41-4705. Felonies.--Any other crime now or hereafter punishable by imprisonment for a term of years in the Arkansas State Penitentiary shall be a felony. [Acts 1973, No. 438, §5, p. ___.]

41-4706. Conviction of capital felonies--Punishment.--A person convicted of a capital felony shall be punished by death by electrocution or by life imprisonment without parole as provided in Section 10 [§41-4710] hereof. [Acts 1973, No. 438, §6, p.___.]

41-4707. Conviction of life felony without parole--Punishment.--A person convicted of a life felony without parole shall be imprisoned in the Arkansas State Penitentiary for the remainder of his life and shall not be released except pursuant to a commutation, pardon, or reprieve of the Governor, conducted and granted in accordance with Section 14 [§41-4714] hereof. [Acts 1973, No. 438, §7, p. ___.]

41-4708. Conviction of life felony--Punishment.--A person convicted of a life felony shall be imprisoned in the State Penitentiary for the remainder of his life and shall not be released except pursuant to a commutation, pardon, or reprieve of the Governor or pursuant to parole procedures now or hereafter established by law. [Acts 1973, No. 438, §8, p. ___.]

41-4709. Conviction of felony--Punishment.--A person convicted of a felony shall be punished by a fine and/or imprisonment in the Arkansas State Penitentiary as may now or hereafter be provided by law. [Acts 1973, No. 438, §9, p. ___.]

41-4710. Trial procedure--Verdict in writing.--A person charged with a capital felony shall be given a jury trial and sentenced pursuant to the following procedure:

(a) After presentation of all evidence and witnesses to be offered by the State and/or the defendant as to the guilt or innocence of the defendant, instructions to the jury, and argument by counsel, the jury shall retire and consider the case.

(b) If the jury finds the defendant guilty of a capital felony, the same jury shall sit again to determine whether the defendant shall be sentenced to death or life imprisonment without parole.

(c) In the proceeding to determine sentence, evidence may be presented as to any matters relevant to sentence and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in Sections 11 [§41-4711] and 12 [§41-4712] of this act. The State and the defendant or his counsel shall be permitted to present argument for or against the sentence of death.

(d) After hearing all the evidence as to sentence, the jury shall again retire and render a sentence based upon the following:

(i) whether beyond a reasonable doubt sufficient aggravating circumstances, as enumerated in Section 11 [§41-4711] of this act, exist to justify a sentence of death;

(ii) whether sufficient mitigating circumstances as enumerated in Section 12 [§41-4712] of this act exist to justify a sentence of life imprisonment without parole.

(e) The jury in rendering its verdict shall set forth in writing its findings as to each of the aggravating or mitigating circumstances enumerated in Sections 11 [§41-4711] and 12 [§41-4712] hereof and shall set forth in writing its conclusion:

(i) that sufficient aggravating circumstances (do or do not) exist beyond a reasonable doubt to justify a sentence of death;

(ii) that there are (or are not) sufficient mitigating circumstances to outweigh the aggravating circumstances.

(f) If the jury does not make the findings requiring the death sentence by unanimous verdict, the court shall impose sentence of life imprisonment without parole. [Acts 1973, No. 438, §10, p. ___.]

41-4711. Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(a) the capital felony was committed by a person under sentence of imprisonment;

(b) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

(c) the defendant in the commission of the capital felony knowingly created a great risk of death to one (1) or more persons in addition to the victim;

(d) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(e) the capital felony was committed for pecuniary gain; and

(f) the capital felony was committed for the purpose of disrupting or hindering the lawful exercise of any governmental function, political function or the enforcement of laws. [Acts 1973, No. 438, §11, p. ___.]

41-4712. Mitigating circumstances.--Mitigating circumstances shall be the following:

(a) the capital felony was committed while the defendant was under extreme mental or emotional disturbance;

(b) the capital felony was committed while the defendant was acting under unusual pressures or influences, or under the domination of another person;

(c) the capital felony was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication or drug abuse;

(d) the youth of the defendant at the time of the commission of the capital felony; or

(e) the capital felony was committed by another person and the defendant was an accomplice or his participation relatively minor. [Acts 1973, No. 438, §12, p. ___.]

41-4713. Review.--Nothing herein shall be construed to limit the powers of the Supreme Court to review and reverse the finding of guilt for errors of law,

prejudice, insufficient evidence, or any other reason now permitted on review of convictions and sentences to life imprisonment. [Acts 1973, No. 438, §13, p. ___.]

41-4714. Commutations--Pardons--Reprives--Rules and regulations--Applications.--Commutations, pardons, or reprieves by the Governor of any sentence of a person convicted of a capital felony or of a life felony without parole shall be granted, pursuant to Article 6, Section 18 of the Constitution of Arkansas, under the following rules and regulations:

(a) A copy of the application for pardon, reprieve, or commutation (hereinafter referred to as the application) of such sentence and/or convicted person shall be filed with the Secretary of State, the Attorney General, and the Prosecuting Attorney, Sheriff and Circuit Judge for the County in which the offense of the applicant was committed.

(b) The application setting forth the grounds upon which the pardon, reprieve, or commutation is asked shall be published for two (2) insertions in a newspaper of general circulation in the county in which the offense of the applicant was committed.

(c) On granting the application, the Governor shall include in his order a list of his reasons for granting the application and shall file a copy of his order and his reasons therefor with each house of the General Assembly, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve. [Acts 1973, No. 438, §14, p. ___.]

41-4715. Parole--Persons ineligible.--A person sentenced for a capital felony to life without parole or for a life felony without parole shall not be eligible for parole and shall not be paroled. [Acts 1973, No. 438, §15, p. ___.]

41-4716. Parole--Sentence commuted to term of years--Effect.--If a person sentenced to life without parole or for a life felony without parole has his sentence commuted by the Governor to a term of years, such person shall not be paroled, nor shall the length of his incarceration be reduced in any way to less than the full term of years specified in the order or commutation or in any subsequent orders of commutation. [Acts 1973, No. 438, §16, p. ___.]

STATEMENT OF THE CASE

The Petitioner, Carl Albert Collins, was charged and tried for the capital felony murder of John Welch in the Circuit Court of Washington County, Arkansas. On December 4, 1974, a jury found the Petitioner guilty as charged and later fixed his punishment at death by electrocution, which was imposed upon the Petitioner on December 13, 1974.

The Petitioner's trial was a bifurcated proceeding consisting of separate guilt and sentence hearings. During the guilt determination proceeding, testimony by Mrs. Welch, wife of the deceased, was offered that the Petitioner attacked her and that shortly thereafter she saw the Petitioner leaving the Welch farm house carrying a shotgun. Mrs. Welch also testified that she saw her husband, John Welch, lying injured on the farm house floor.

Mr. Welch sustained a mortal shotgun wound, but while lying on the floor told his wife that the Petitioner had shot him and taken his billfold. Other evidence was offered at the Petitioner's trial that money was missing from Mr. Welch's billfold and that a shotgun was missing from the farm house. The jury rendered a verdict of guilty to the charge of capital felony murder while in the perpetration of a robbery.

At the sentencing phase of the bifurcated trial, the same jury sat again to determine whether the Petitioner would be sentenced to death by electrocution or life imprisonment without parole. The jurors were offered evidence relating to aggravating or mitigating circumstances as set out by statute. Aggravating circumstances were limited to the ones enumerated and had to be found to exist beyond a reasonable doubt, while mitigating circumstances were any the jury felt justified to impose less than the maximum sentence.

The jury was required to render their verdict in writing and instructed to impose the death penalty only after weighing the aggravating and mitigating circumstances. Before the jury could impose the death penalty, they had to find any aggravating circumstance to exist beyond a reasonable doubt, that no mitigating circumstances existed which outweighed the aggravating circumstances and that whether beyond a reasonable doubt sufficient aggravating circumstances

existed to justify a sentence of death. On December 5, 1974, the Petitioner was sentenced to death by electrocution.

The jury found three aggravating circumstances to have existed beyond a reasonable doubt, that the one mitigating circumstance found to exist did not outweigh the aggravating circumstances and the aggravating circumstances justified the sentence of death beyond a reasonable doubt.

The Arkansas Supreme Court affirmed the Petitioner's conviction and sentence of death on December 22, 1975, and denied Petitioner's motion for rehearing on January 19, 1976.

HOW THE CONSTITUTIONAL QUESTIONS WERE RAISED AND ANSWERED BELOW

Petitioner, by oral motion, first questioned the validity of the Arkansas procedure at the trial level. At the close of the State's case, the Petitioner sought a dismissal of the charges stating,

> "the Arkansas Statute pertaining to [capital] felony murder is unconstitutional and that it violates the 8th Amendment of the U. S. Constitution, prohibitition against cruel and unusual punishment; and further violates the U. S. Constitution's 14th Amendment, more particularly due process and equal protection clauses..." (TR 195-196).

The trial court overruled the motion. (TR 196)

Petitioner again, by oral motion, requested the trial court to set aside the verdict on the above grounds, (TR 255-256) but the trial court again overruled the motion. (TR 256)

On appeal to the Supreme Court of Arkansas, the Petitioner briefed and argued the constitutional questions presented here for review by Writ of Certiorari. The Petitioner first argued that the sentence of death imposed upon him was violative of the Eighth and Fourteenth Amendments to the United States Constitution because the jury still retained sentencing discretion.

The Arkansas Supreme Court, speaking through Mr. Justice George Rose Smith, held the Petitioner's sentence of death to be constitutionally permissible since the jury discretion in the imposition versus non-imposition of the capital punishment was a choice reasonably made. (App. A., infra, at 4A). Mr. Justice Smith stated the jury's reasoned choice was proper since the jury had to determine after the weighing of the aggravating circumstances against mitigating circumstances whether the sentence of death was justified. (App. A., infra, at 4-5A). The Arkansas Supreme Court concluded that the statutory approach to the problem of imposing a sentence of death was valid since the verdict was known and could be compared with the punishment imposed in other cases. (App. A., infra, 4A).

Petitioner next asserted that his fundamental right to life guaranteed by the Fourteenth Amendment to the United States Constitution was violated by the sentence of death imposed upon him by the Washington County Circuit Court. The Arkansas Supreme Court seemingly did not pass directly on the Petitioner's contention other than to recognize the sovereign's power, both national and state, to deprive a person of his life if due process of law was observed. (App. A., infra, at 3A).

And finally, the Petitioner argued that the electrocution method of execution violated the Eighth Amendment prohibition of cruel and unusual punishments. The Supreme Court of Arkansas held the Constitution prohibits only punishments involving torture or other unnecessary cruelty and that the record contained no proof that death by electrocution was either. (App. A., infra, 5A).

I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PUNISHMENT OF DEATH IMPOSED UPON THE PETITIONER AS PROVIDED BY ACT 438 BY THE STATE OF ARKANSAS VIOLATES THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS BECAUSE OF JURY SENTENCING DISCRETION AND THE LACK OF APPELLATE REVIEW PROVISIONS TO INSURE NONARBITRARY APPLICATION OF THE DEATH PENALTY.

This Court in Furman v. Georgia, 408 U.S. 238 (1972) held that the imposition and carrying out of the death penalty in the cases then at bar constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. Thereafter, most state courts interpreting Furman held existing death penalty statutes unconstitutional if they afforded the judge or jury uncontrolled discretion to impose a sentence of death or a lesser degree of punishment. See Bartholomey v. State, 267 Md. 175, 297 A. 2d 696 (1972) and People v. Fitzpatrick, 32 N.Y. 2d 499, 300 N.E. 2d 139 (1973).

The Supreme Court of Arkansas also held the existing discretionary statutes which permitted the jury to decide between the punishments of life and death to be unconstitutional. See Graham v. State, 253 Ark. 462, 486 S.W. 2d 678 (1972) and O'Neal v. State, 253 Ark. 574, 487 S.W. 2d 618 (1972). It soon became interpretated law from the Furman mandate that if the sentencing authority possessed the uncontrolled discretion to inflict the death penalty versus some lesser punishment, the process was unconstitutional, Bartholomey, Fitzpatrick, Graham and O'Neal, supra.

To determine the rationale of Furman that justifies declaring such discretionary power unconstitutional, we look to Mr. Justice Douglas in Furman, 408 U.S. 238, 256 (1972) stating that the purpose of the Eighth Amendment clause is

to require the implementation of evenhanded, nonselective and nonarbitrary laws. One of the concerns of Mr. Justice Stewart in Furman, 408 U. S. 238, 309-310 (1972) was that the Petitioners were among a capriciously selected handful upon whom the sentence of death was in fact imposed. Mr. Stewart concluded that the Eighth and Fourteenth Amendments could not tolerate the infliction of such a unique penalty as the sentence of death in such a wanton and freakish manner. Mr. Justice White in Furman, 408 U.S. 238, 313 (1972) held as violative of the Eighth Amendment as procedure which allowed the death penalty to be exacted with such great infrequency and without a meaningful basis for distinguishing the few cases in which it was imposed from the many cases in which it was not imposed.

The discretionary power to impose the death sentence in Furman as arbitrary and of unequal application is present in the Arkansas capital punishment statute. Furman found that the death sentence had been inflicted in the past without use of a meaningful standard to guide the imposition of capital punishment and to provide the appellate courts with a basis for reviewing the propriety of a sentence of death. This same lack of any judicially manageable standard is present in Arkansas's system that allows a jury arbitrary discretion and power in determining whether to sentence the convicted person to death or life without parole. A brief examination of the Arkansas statutes reveals how Arkansas's system for inflicting capital punishment falls short of the constitutional requirements enunciated in Furman.

Act 438 enacted by the Arkansas Legislature in 1973 re-established the use of the death penalty for a limited number of specified capital felony offenses. The purpose of Act 438 was to adopt a death penalty statute which

eliminated the arbitrary discretion this Court declared unconstitutional in Furman. However, since the jury's discretion is to be based upon loosely defined considerations which lack the required precision for proper application of the jury's discretion or review of that discretion by an appellate court, Act 438 has failed to eliminate the impermissible arbitrariness held unconstitutional by Furman. The fact that Act 438 does not provide sufficient appellate review procedures to insure nonarbitrary imposition of the death penalty further supports Petitioner's contention that the Arkansas statute does not meet the requirements of Furman.

Ark. Stat. Ann. §41-4701 et al. (Supp. 1973) is the codified version of Act 438 which defines all the capital felony offenses and sets out the trial procedure which could give rise to the imposition of the death penalty. Ark. Stat. Ann. §41-4702 (Supp. 1973) defines the various capital felony offenses. The Arkansas statutory scheme requires any defendant charged with a capital felony offense to receive a bifurcated trial. Ark. Stat. Ann. §41-4710 (a) (Supp. 1973) sets out the trial procedure which specifies that the defendant shall be given a jury trial, with the jury first making the guilt or innocence determination.

After a person has been found guilty of committing a capital felony offense, the jury is required to sit again to determine whether that person is to receive a sentence of death or life imprisonment without parole, Ark. Stat. Ann. §§41-4710 (b) and 41-4706 (Supp. 1973). Before the death penalty can be imposed, the jury may consider "any matters relevant to sentence" and is required to hear evidence relating to enumerated aggravating and mitigating circumstances, Ark. Stat. Ann. §§41-4710 (c), 41-4711 and 47-4712 (Supp. 1973).

The jury must render a written verdict as to its findings concerning the aggravating or mitigating circumstances

after hearing all the evidence as to the sentence. Before a jury can sentence a person to death, a three step process involving the above mentioned aggravating and mitigating circumstances must take place. First, the jury must find any aggravating circumstances to exist beyond a reasonable doubt. Second, any mitigating circumstances found to exist must be found to be insufficient, in the jury's discretion, to outweigh the existing aggravating circumstances and finally, the aggravating circumstances must be found beyond a reasonable doubt to justify the sentence of death. See Ark. Stat. Ann. §41-4710 (d) (e) (Supp. 1973).

Petitioner was found guilty of capital felony murder while in the perpetration of robbery and the jury rendered a guilty verdict accordingly (TR 250). The jury sat again to consider evidence relevant to the sentence of either death by electrocution or life imprisonment without parole. A jury verdict sentencing Petitioner to death by electrocution was rendered and subsequently pronounced upon the Petitioner (TR 323).

During the second phase of the bifurcated trial relating to the sentence to be imposed, the jury was instructed to consider only the six enumerated aggravating circumstances and find the presence or absence of such beyond a reasonable doubt (TR 267). The trial court interpretated Ark. Stat. Ann. §41-4712 (Supp. 1973) not to limit the jury's consideration to only the five enumerated mitigating circumstances, but due to Ark. Stat. Ann. §41-4710 (e) (Supp. 1973) did require the jury to write out any other mitigating circumstances they found to exist (TR 268-270). The trial court instructed the jury that a mitigating circumstance did not excuse the offense but might justify imposing less than the maximum sentence, and the five mitigating circumstances given to the jury were not the only circumstances which could be considered as

mitigating circumstances. The court further instructed the jury, "I am going to give you five mitigating circumstances, but there may be others, if [you] determine they exist from what you heard in the previous case [guilt or innocence hearing] and from what you hear today [sentence hearing]". (TR 268)

The jury returned a written verdict showing the existence beyond a reasonable doubt of three aggravating circumstances (TR 30-31) and the existence of one mitigating circumstance (TR 32-33). Aggravating circumstances found to exist were that the Petitioner had been previously convicted of a felony involving the use or threat of violence to a person, that the Petitioner in the commission of the capital felony offense knowingly created a great risk of death to a person other than the victim, and that the Petitioner committed the capital felony for pecuniary gain. The single mitigating circumstance found to exist was the Petitioner's youth at the time of the commission of the capital felony (TR 34). There was a proffer of evidence, stipulated to by the prosecuting attorney, that the Petitioner was 20 years old at the time of the commission of the capital felony (TR 70).

A sentence of death by electrocution was imposed upon the Petitioner after the jury further concluded that the mitigating circumstances were, in their discretion, insufficient to outweigh the aggravating circumstances and the aggravating circumstances justified beyond a reasonable doubt the sentence of death (TR 34).

The validity of Act 438 was considered and approved for the first time by the Arkansas Supreme Court in cases decided simultaneously. See Collins v. State, 259 Ark. 8, 531 S.W. 2d 13 (1975) and Neal v. State, 259 Ark. 27, 531 S.W. 2d 17 (1975). Mr. Justice Smith, in Collins v. State, 259 Ark. 8, 12-13 (1975) stated the essence of Furman only precluded capital punishment if the system allowed the jury to impose the death penalty in one case, and with no disclosed

reason, refrain from imposing it in another apparently similar case. The court concluded that so long as the choice between imposition and non-imposition was reasonably made, Furman does not prohibit the exercise of such sentencing discretion. Mr. Justice Smith discussed the trial procedure of Act 438 fully. The fact Petitioner was first convicted of the capital felony murder and then sentenced to death after the same jury weighed limited aggravating circumstances against unlimited mitigating circumstances led Mr. Justice Smith to state the "ultimate issue submitted was whether the jury found beyond a reasonable doubt that sufficient aggravating circumstances existed to justify a sentence of death". Therefore, the Supreme Court of Arkansas held Act 438 to be constitutional so long as the choice between life and death was reasonably made, with disclosed reasons for the sentence after the weighing process of aggravating and mitigating circumstances had occurred.

Mr. Justice Smith in Collins v. State, 259 Ark. 8, 12-13 (1975) approvingly cited State v. Dixon, 283 So. 2d 1 (Fla. 1973), Coley v. State, 231 Ga. 829, 204 S.E. 2d 612 (1974) and Jurek v. State, 522 S.W. 2d 934 (Tex. Crim. App. 1975) as authority from other jurisdictions that the Arkansas statutory procedure conformed to the general approach which satisfies the requirements of Furman v. Georgia, supra. All three of the above cases upheld the constitutionality of their respective State post-Furman death penalty statutes. The state supreme courts reasoned their new statutory procedures produced reasonable and controlled discretion rather than capricious and discriminatory discretion, Dixon, supra, at 6-7; or effectively insured against the arbitrary and wanton imposition of a sentence of death, Jurek, supra, at 939; or employed the death penalty without arbitrary application, Coley, supra, at 615.

The Petitioner submits notwithstanding the reasoning expressed by the Arkansas Supreme Court in Collins and Neal, supra, or the other authorities cited, the sentencing procedure in Act 438 again opens the door to the arbitrary imposition of the death penalty expressly forbidden by Furman v. Georgia, supra. The invalidity of Act 438 as that of previous discretionary statutes, is the presence or potential presence of factors which might influence the jury to the extent of producing arbitrary discretion. Furman was not only concerned with the arbitrary discretion in the death penalty statutes before this Court in 1972, but also future statutes that could produce the above unconstitutional arbitrariness. Factors such as considerations loosely defined as "matters relevant to the sentence" or unlimited considerations lacking precision for proper evaluation should not be the basis for a jury's decision to sentence a person to death.

Ark. Stat. Ann. §41-4710 (c) (Supp. 1973) allows a jury to hear evidence as to "any matters relevant to [the] sentence" but does not limit or define "any matters" other than to require that they be "relevant to [the] sentence". The statute does not specify and it is more reasonable to assume a relevancy standard of a juror rather than the judge or court since the jury is receiving the evidence and the statute does not specify either way. Other jurisdictions allow consideration of any relevant matters but in State v. Dixon, supra, at 5, such consideration is limited to "matters that the court deems relevant to sentence" (emphasis added), or limited to consideration of any mitigating circumstance even though not enumerated but "otherwise authorized by law" (emphasis added), Coley v. State, at 613. The Arkansas statutory procedure appears to allow consideration by the jury of factors broad in the sense of being "all matters", and limited only as to being relevant to [the] sentence".

The Arkansas procedure made no provision for the interjection of these broad considerations in the process the jury must complete to render a sentence of death. Other than the statutory directive to the jury, "after hearing all the evidence as the sentence" found in Ark. Stat. Ann. §41-4710 (d) (Supp. 1973), there is no mechanism for the jury to consider the evidence when they weigh the aggravating and mitigating circumstances. Thus the jury, when required to find by written verdict the existence or nonexistence of the aggravating or mitigating circumstances may or may not be considering other relevant matters without written findings or "disclosed reasons".

That is exactly the statutory practice which led this Court to review such a procedure as arbitrary and unconstitutional as cruel and unusual. Without properly defined "relevant matters" or properly defined standards to use the evidence within the discretionary process of imposing a sentence of death, the jury's sentencing discretion again becomes arbitrary and uncontrolled. The sentence is arbitrary and uncontrolled since the influencing evidence could actually remain unknown to the trial court and thus inaccessible for review and comparison to insure nonarbitrary imposition of the death penalty.

At the Petitoner's trial the court instructed the jury that they were not limited to the five enumerated mitigating circumstances (TR 268-270) but if they found a mitigating circumstance to exist which was not enumerated, a written finding was required. At first glance this interpretation of Ark. Stat. Ann. §41-4712 (Supp. 1973) seemingly only benefits the Petitioner and he should therefore not be heard to complain. However, the unlimited availability of mitigating circumstances is directly in conflict with Furman's mandate of nonarbitrary imposition of capital punishment. The process

of weighing mitigating circumstances against aggravating circumstances to prevent the arbitrary imposition of the death penalty is nullified by the availability of an unlimited number of mitigating circumstances, circumstances which could, in the jury's discretion, prevent a sentence of death from being imposed.

A jury under Arkansas procedure is specifically given the power to find, in its discretion, mitigating circumstances which can preclude the imposition of death by electrocution, Ark. Stat. Ann. §§41-4703 and 41-4710 (d) (e) (Supp. 1973). Giving the jury the unlimited power to find a mitigating circumstance so long as they simply reduce the finding to a writing most surely will lead to discretionary decisions which will again cause the death penalty to be arbitrarily inflicted.

The Petitioner can only interpret the trial court's instruction (TR 268) as to mitigating circumstances one way. If the jury finds and reduces to a writing the existence of a mitigating circumstance not enumerated, and that mitigating circumstance is sufficient to outweigh any aggravating circumstances, the jury can in its discretion preclude the imposition of the death penalty. Thus the jury "in fairness and mercy" could decide the circumstance of the defendant being female to be sufficient mitigation to impose the lesser sentence of life imprisonment without parole. The unlimited power of a jury to find a mitigating circumstance which could effectively and legally block the sentence of death does not lend itself to the implementation of evenhanded justice and increases the possibility of random selection of persons to receive the death penalty.

Further, the lack of precision of the enumerated considerations of aggravating and mitigating circumstances to

be weighed by the jury during the sentencing proceeding hinders the purpose of Furman, that of preventing the arbitrary imposition of capital punishment. The Arkansas Supreme Court in Neal v. State, 259 Ark. 27, 32-33 (1975) ruled that the "terminology" describing the above considerations to be a matter of such common understanding and practice that an ordinary man or juror would not have to speculate as to its meaning. But, a comparison of the circumstances found to exist in Petitioner's case and the companion case of Neal, supra, illustrates that although the enumerated circumstances may not be subject to speculation in the sense of understanding the terminology used, their lack of precision can lead to unlike results in cases presenting similar circumstances.

For example, Ark. Stat. Ann. §41-4712 (d) (Supp. 1973) provides that the "youth of the defendant at the time of the commission of the capital felony" can be a mitigating circumstance. Petitioner was 20 years old (TR 70) at the time the capital felony offense was committed. Appellant Neal in Neal v. State, 259 Ark. 27, 36 (1975) was 19 1/2 years of age at the time of the commission of the capital felony. The jury in Collins v. State, 259 Ark. 8, 13 (1975) found Petitioner's "youth" to be a mitigating circumstance while the jury in Neal v. State, 259 Ark. 27, 33 (1975) did not find the appellant's "youth" to be a mitigating circumstance.

It should be pointed out that the mitigating circumstance is not concerned with "age" but with the "youth" of the defendant, and such an evaluation is in the eye of the beholder, the jury. One jury found the age of 20 to be a mitigating circumstance while another jury could not find the age of 19 1/2 to be a mitigating circumstance of youthfulness. This lack of precision in the enumerated circumstances considered by the jury during the process of deciding which

sentence to impose does not lend itself to the elimination of arbitrarily inflicted sentences of death. And of course, any question of preciseness of a mitigating circumstance not enumerated but found to exist by the jury would have to be determined in a case by case examination.

The Petitioner's contention that Act 438 is unconstitutional since it allows the imposition of the death sentence based upon considerations loosely defined as "matters relevant to the sentence" or unlimited considerations lacking precision for proper evaluation is further supported by the Arkansas Supreme Court's ruling in Neal v. State, supra. Mr. Justice Holt in Neal v. State, 259 Ark. 27, 34 (1975) held Ark. Stat. Ann. §41-4710 (Supp. 1973) not to require reintroduction of evidence of any matters relevant to the sentence at the second phase of the bifurcated proceeding. Although the Court's holding was specifically directed toward the reintroduction of evidence as to aggravating circumstances, it is reasonable to interpret the Court's ruling as being applicable to all evidence as to sentence since the above section controls all evidence to be presented. The Arkansas Supreme Court construed the above section to afford the opportunity to produce evidence of any aggravating circumstances but only "in addition to any evidence of that nature previously adduced". Mr. Justice Holt concluded, "in other words, it need not repeat that type of evidence". Therefore, under the Arkansas procedure as interpreted by the highest Court in the State, the jury can consider any matter relevant to sentence whether introduced during the guilt determination proceeding or the sentence determination proceeding. Also, the jury could consider any factor they deem to be a mitigating circumstance and thus in their discretion, preclude the imposition of the death penalty without regard to which proceeding developed the evidence presented to the jury.

Therefore, Petitioner prays that Act 438 be declared unconstitutional as enacted by the Arkansas Legislature, applied by the Circuit Court of Washington County and interpreted by the Supreme Court of Arkansas. Act 438 does not sufficiently restrict the jury's sentencing discretion while choosing between the penalties of death or life as required by Furman, supra. Under the Arkansas procedure, the jury is afforded uncontrolled sentencing discretion since it may hear any matters relevant to the question of which sentence is to be imposed. The availability of unlimited mitigating circumstances which can preclude the imposition of the death penalty most certainly does not restrict the jury's sentencing discretion.

If, however, this Court decides the above application of Act 438 does not in fact violate the requirements of Furman, supra, the Arkansas procedure does point out the need for mandatory appellate review to insure nonarbitrary application of the death penalty. The basis of a jury's decision to sentence a person to death should not be evidence defined loosely as matters relevant to this sentence or unlimited mitigating circumstances which could legally preclude the imposition of the death penalty. The Petitioner therefore contends the absence of mandatory appellate review in Act 438 renders the Arkansas procedure unconstitutional as violative of Furman v. Georgia, supra.

The essence of Petitioner's above contention was seemingly approved by the Arkansas Supreme Court in Collins v. State, supra. Mr. Justice Smith in Collins v. State, 259 Ark. 8, 13 (1975) cited Dixon, Coley, and Jurek, supra, stating, "hence the basis for the verdict is known and can be compared with the punishment imposed in other cases". However, a review of Act 438 does not disclose any comparable statute as relied upon by the state supreme courts in the above cases. Ark. Stat.

Ann. §41-4713 (Supp. 1973) does not address itself to mandatory appellate review for comparative sentencing. The above statute is simply a declaration of the Arkansas Legislature's intent that noting in the new capital felony act will preclude review by the Supreme Court of Arkansas as to the findings of guilt, errors of law, prejudice and other reasons now permitted on review.

The Court of Criminal Appeals of Texas in Jurek v. State, 522 S.W. 2d 934, 939 (1975) held the Texas statutory scheme directed and guided the jury's deliberations and thus channeled the jury's consideration on punishment and effectively insured against the arbitrary and wanton imposition of the death penalty. The Texas Court placed emphasis on the fact the statute provided for swift and mandatory appellate review, V.A.C.C.P., Art. 37.071 (f).

The Supreme Court of Florida in State v. Dixon, 283 So. 2d 1, 7-10 (Fla. 1973) held their post-Furman death penalty statute to be constitutional since it provided a five-step process to safeguard against the arbitrary imposition of the death penalty. The Court concluded that the discretion charged in Furman v. Georgia, supra, could be controlled and channeled and that the Florida procedure actually produced reasoned judgment rather than an exercise in discretion.

The reasoning of the Florida Court that the Florida procedure could produce reasoned judgment is based upon Fla. Stat. Ann. §921.141 (5) which requires mandatory appellate review within sixty days. The above section was interpreted to provide that any inappropriate application by a jury of the standards as to aggravating and mitigating circumstances under the facts of the particular case, could be corrected. The Florida Court concluded,

> "Review...guarantees that the reason present in one case will reach a similar result to that reached under similar circumstances in another case...if a defendant is sentenced to die, this

> Court can review that case in light of the other decisions and determine whether or not the punishment is too great."

And in Cooley v. State, 231 Ga. 829, 204 So. 2d 612 (1974) the Supreme Court of Georgia placed heavy emphasis on its statutory scheme providing automatic appellate review in death sentence cases in order to provide comparative sentencing. The Georgia Procedure, Ga. Code Ann. §27-2537 (1973), provides for automatic appellate review of death sentences by the State Supreme Court within ten days. The Supreme Court is specifically directed to consider the punishment as well as any enumerated errors by way of appeal and charged with the responsibility to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. The Court is also required to refer in its decision to the similar cases which it took into consideration during the comparative sentence process.

The above Georgia statute was construed by the Georgia Supreme Court in Cooley, supra, at 616, to require comparative sentencing,

> "so that if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts, it will be set aside as excessive."

The appellant in the Georgia case had received the death penalty for rape. After the mandatory appellate review, the Georgia Supreme Court held that compared to the sentence in previous cases the sentence of death was disproportionate and thus remanded the case for resentencing by the trial judge.

Act 438 does not require appellate review for comparative sentencing although the Supreme Court of Arkansas in Collins, supra, at 13, acknowledged the need for such an approach. The Petitioner contends the essence as well as the spirit of Furman v. Georgia, supra, requires mandatory appellate review to facilitate comparative sentencing to

insure that the death penalty will not be arbitrarily imposed.

It is the Petitioner's contention that comparative sentencing is required regardless; but due to the application and interpretation of Act 438 in his particular case, comparative sentencing is an absolute necessity. If a jury under Arkansas law is allowed to sentence a defendant to death after hearing evidence of any matters relevant to the sentence, comparative sentencing is necessary to prevent uncontrolled, arbitrary infliction of capital punishment. And if a jury is allowed to find in its discretion any factor to be a mitigating circumstance which could legally preclude the imposition of a death penalty, comparative sentencing is most certainly needed to prevent the wanton and random selection of persons to be sentenced to death. Therefore, the Petitioner submits that Act 438 is unconstitutional and his sentence of death is also unconstitutional and should be vacated.

II

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE SENTENCE OF DEATH IMPOSED UPON THE PETITIONER VIOLATES PETITIONER'S FUNDAMENTAL RIGHT TO LIFE GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE PETITIONER'S FUNDAMENTAL RIGHT TO BE PROTECTED FROM CRUEL AND UNUSUAL PUNISHMENTS GUARANTEED BY THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The right to life is a constitutionally protected fundamental right guaranteed by the United States Constitution Amendment XIV, Section 1 in part.

> "...nor shall any state deprive any person of life, liberty, or property, without due process of law;..."

The Supreme Judicial Court for the Commonwealth of Massachusetts held in Commonwealth v. O'Neal, ___Mass. ___, 327 N.E. 2d 662, 668 (1975), the premise of Petitioner's contention:

> "We believe that the right to life is fundamental and, further, that this proposition is not open to serious debate, of Yick Wo v. Hopkins, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220, (1886); Johnson v. Zerbst, 304 U.S. 458, 462, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)."

In addition to the prominent position which the right to life occupies in the due process clause of the United States Constitution, it appears obvious that without life no other right can exist for any man. O'Neal, supra, at 668. Therefore, the explicit guarantee of the fundamental right to life by the United States Constitution, Amendment XIV, Section 1, is reinforced by the implicit nature of the right to life being the absolute basis for the existence of any other rights.

When a fundamental right is contravened by state action, such state action must be closely scrutinized. The test which must be applied to such state action abridging a fundamental right is two-pronged. A state must demonstrate that

the action in question is necessary to promote a compelling governmental interest. Shapiro v. Thompson, 394 U.S. 618, 664 (1969); and the court must determine that the state has shown that the action in question is the least restrictive means to accomplish the compelling interest. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

Petitioner therefore urges this Court that the "compelling state interest--least restrictive means" test must be used to scrutinize the action of the State of Arkansas in taking from Petitioner the most fundamental of all rights. The Supreme Judicial Court of Massachusetts in O'Neal, supra, at 668 said:

> "...We hold that life is a constitutionally protected fundamental right, the infringement upon which triggers strict scrutiny under the compelling state interest and least restrictive means test. Thus, in order for the state to allow the taking of life by legislative mandate, it must demonstrate that such action is the least restrictive means toward furtherance of a compelling governmental end."

If the Court fails to find that such action on the part of the State of Arkansas is the least restrictive means toward accomplishing a compelling governmental end, Petitioner's sentence of death should not stand.

> "Thus, if there is an alternative means by which the state can fulfill its purpose, having less adverse effects on fundamental constitutional rights, the state is required to use the less restrictive, more precisely adopted means." O'Neal, supra, at 667.

Petitioner submits that the State of Arkansas has failed to satisfy the "least restrictive means" requirement, and prays that this matter be remanded to the Courts of the State of Arkansas to take such action as will satisfy the "least restrictive means" requirement.

Petitioner also submits that the Eighth Amendment to the United States Constitution guarantees the fundamental right to be protected from cruel and unusual punishments, as applied to the several states by the Fourteenth Amendment

to the United States Constitution.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishments, and the United States Supreme Court has invoked the Constitutional proscription to void a punishment four times. Comment, The Death Penalty Cases, 56 Cal. L. Rev. 1268, 1326 (1968). In Robinson v. California, 370 U.S. 660 (1962), this Court declared criminal punishments for the mere status of narcotics addiction unconstitutional. In Trop v. Dulles, 356 U.S. 86 (1958), the criminal penalty of expatriation was also declared unconstitutional. Weems v. United States, 217 U.S. 349 (1910) held 15 years at hard labor in ankle chains and additional civil disabilities for falsification of public record violative of the Eighth Amendment. Finally, in Furman v. Georgia, 408 U.S. 238 (1972), this Court struck down death penalty statutes that allowed untrammeled discretion as to the sentence imposition in death penalty cases.

The United States Supreme Court has substantially discussed the Eighth Amendment proscription on seven other occasions. Goldberg, Declaring The Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1777 (1970). The last time this Court rejected a contention that capital punishment was cruel and unusual, was Louisiana v. Resweber, 329 U.S. 459 (1947). But some years later in Trop v. Dulles, 356 U.S. 86 (1958), this Court produced dictum to the same effect.

In Resweber, this Court denied numerous writs filed to prevent a subsequent execution after the first execution failed due to mechanical difficulty. This Court held that the cruelty which the Constitution protects the citizens from is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The earlier case of Wilkerson v. Utah, 99 U.S. 130 (1879), upheld a sentence of public shooting as not cruel and unusual based mostly upon a review of long usage.

In Re Kemmler, 136 U.S. 436 (1890), found this Court again discussing cruel and unusual punishment, stating that punishments invloving torture or a lingering death are cruel with "cruel" implying something inhumane and barbarous, more than extinguishing life.

Reviewing this Court's definitions of cruel and unusual punishment in the Resweber, Wilkerson, and Kemmler cases, it is apparent that this Court, up until 1947, was of the view that the constitutional protection from cruel and unusual punishments did not proscribe capital punishment.

Petitioner submits that capital punishment is per se unconstitutional as a violation of the Eighth Amendment to the United States Constitution. The Eighth Amendment proscription as previously mentioned, has been incorporated by the Fourteenth Amendment and applies directly to the several states. Gideon v. Wainwright, 372 U.S. 335 (1963), Malloy v. Hogan, 378 U.S. 1 (1964). The freedom from cruel and unusual punishment and the right to life are fundamental rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution. The abridgment of such fundamental rights requires the application of the "state compelling interest--least restrictive means" test. Shapiro v. Thompson, supra, and Griswold v. Connecticut, supra, Commonwealth v. O'Neal II, 339 N.E. 2d 676 (1975).

Mr. Justice Brennan in Furman v. Georgia, 408 U.S. 238, 258 (1972) said:

> "The cruel and unusual punishments clause, like other great clauses of the Constitution, is not susceptible of precise definition."

This does not mean that at any specific time some workable definition may not be extracted from court rulings and social norms. These benchmarks come from a clause not static, but drawn from the evolving standards of decency that mark the progress of a maturing society. Trop v. Dulles, 356 U.S. 86 (1958).

Mr. Justice Brennan in Furman, supra, at 264 cited Weems v. United States, 217 U.S. 249, 373 (1910) and concluded that the constitutional framer's intent was that the Eighth Amendment,

> "was not limited to the proscription of unspeakable atrocities, a constitutional provision is enacted, it is true from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave its birth."

Therefore, the meaning of the Eighth Amendment proscription is ever changing as our social norms change and is not tied to the "experienced evils" that were present at the time of the constitutional convention. Certainly during the existence of our country, there have been punishments used and upheld by courts which the "evolving standards of decency" of our maturing society have now deemed cruel and unusual.

Trop v. Dulles, supra, at 99, re-emphasized the "maturing society" concept of Weems, supra, stating that the proper

> "question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."

Trop, supra, also considered "the dignity of man" as one of the basic concepts underlying the Eighth Amendment. And Mr. Justice Brennan in Furman, supra, at 270, held that

> "a punishment is cruel and unusual...if it does not comport with human dignity,"

explaining that these punishments treat members of the human race as nonhumans and thus are inconsistent with the fundamental premise of the Eighth Amendment clause and that of the common dignity of man and the Fourteenth Amendment guarantee of a fundamental right to life.

Trop, supra, emphasizes a theme set forth in Weems, supra, of mental torture or psychological hurt. In Trop,

supra, this court ruled the penalty of expatriation unconstitutional as violative of the Eighth Amendment recognizing that the punishment did not involve physical mistreatment, but such consequences and distress make the punishment not only cruel and unusual but obnoxious. In Weems, supra, the punishment of hard labor and continued civil disabilities was also declared unconstitutional even in the absence of physical pain.

It is apparent from the proceeding decisions and continued capital punishment litigation, this Court and our society are continually reviewing the death penalty to determine whether or not in a maturing and civilized society such a punishment comports with the dignity of man.

This question takes on a new prospective as to the process of including capital punishment within the Eighth Amendment proscription of cruel and unusual punishments when viewed in light of Trop and Weems, supra, and this Court's holding of unconstitutionality of the applied penalties involving mental torture or psychological hurt and not physical mistreatment. In Re Kemmler, supra, held that punishments of torture or lingering death may be inhumane and barbarous. Mr. Justice Brennan in Furman, supra, at 288, citing People v. Anderson, 6 Cal. 3d 628, 649, 493 P. 2d 880, 894 (1972), pointed out the California Supreme Court holding, noting:

> "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."

People v. Anderson, supra, held the death penalty in California to be an unconstitutional method of punishment.

Petitioner submits that capital punishment is cruel and unusual due to the pain inflicted upon the convicted person by the execution. Resweber, supra, held that the Eighth Amendment proscription applied to

> "cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." (p. 464)

Petitioner raises this point, knowing that the Resweber holding, as previously stated, did not assume the applicability of the Eighth Amendment to state action. From a reading of Resweber, supra, or the other capital punishment cases, Petitioner has been unable to determine if this Court has ever heard evidence as to the actual pain involved in any method of execution, which if present may render all forms of execution unconstitutional, Furman, supra, at 287, footnote 35. The Resweber rationale should be questioned in light of the inherent psychological pain and torture involved in any execution. People v. Anderson, 493 P. 2d 880, 894 (1972).

The sole observance of long usage of capital punishment stands in the way of Petitioner's progress to include such a punishment within the prohibited area of the Eighth Amendment, Wilkerson v. Utah, 99 U.S. 130 (1879). Long usage has been synonymous for public acceptance for the death penalty. The usual evidence offered in favor of continued use is the existence of death penalty statutes in many states. Mr. Justice Brennan best stated the measure of public acceptance of the death penalty in Furman v. Georgia, 408 U.S. 238, 279 (1972):

> "not by its availability, for it might become so offensive to society as never to be inflicted, but by its use." (emphasis added)

The trend is away from the death penalty from a numerical standpoint (199 executions in 1935 to zero in 1971). People v. Anderson, 6 Cal. 3d 628, 493 P. 2d 880 (1972). The conclusion is well stated in Furman v. Georgia, 408 U.S. 238, 300 (1972), where this Court said:

> "when an unusually severe punishment is authorized for wide-scale application but not, because of society's refusal, inflicted save in a few instances, the inference is

> compelling that there is a deep-seated reluctance to inflict it,...the liklihood is great that the punishment is tolerated only because of its disuse."

It is, therefore, Petitioner's contention that the death penalty is encompassed within the constitutional proscription of cruel and unusual punishments under the Eighth Amendment as well as violating the Fourteenth Amendment guarantee of the right to life. Capital punishment comes within the Eighth Amendment proscription due to its unusually severe and painful nature, both physical add psychological, and in its finality and enormity and the fundamental inconsistency of its use in a society in which human dignity is of great value.

Therefore, for the State of Arkansas to inflict such a punishment as the death penalty, infringing upon Petitioner's most basic fundamental rights, the state must show a compelling reason to do so which must certainly be the achievement of a permissible penal objective toward the legitimate ends of criminal punishment.

The four most common penal objectives consistently set forth as legitimate ends of criminal punishment are retribution, protection of society, rehabilitation, and deterrence.

Retribution is not an objective a maturing and civilized society should sanction. The court in People v. Anderson, 493 P. 2d 880, 896 (1972), held:

> "it is incompatible with the dignity of an enlightened society to attempt to justify the taking of life for purposes of vengeance."

Mr. Justice Marshall in Furman v. Georgia, 408 U.S. 238, 343 (1972), stated:

> "retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society,"

concluding that the Eighth Amendment had in fact been adopted to prevent punishment from becoming vengeance.

Protection of society from a convicted criminal may be accomplished by much less severe means than the extinguishment of the criminal's life. Peoole v. Anderson, 6 Cal. 3d 628, 493 P. 2d 880, 896 (1972). Mr. Justice Brennan in Furman v. Georgia, 408 U.S. 238, 300 (1972), came to the same conclusion as to the protection of society and concluded that the effective administration of any state's pardon and parole laws would minimize any danger to society. Enforcement of the existing imprisonment statutes fulfills society's need for protection.

Rehabilitation can in no way be achieved by capital punishment. The finality of the penalty ends forever any hope of rehabilitating a person to become a productive, law abiding citizen.

Deterrence is, as Mr. Justice Marshall pointed out in Furman v. Georgia, 408 U.S. 238, 345 (1972):

> "the most hotly contested issue regarding capital punishment,"

and this is especially true in light of the argument that the death penalty is no more a deterrent to crime than life imprisonment. Mr. Justice Marshall in Furman v. Georgia, 408 U.S. 238, 347 (1972), focused upon the question of deterrence, stating:

> "capital punishment has obviously failed as a deterrent when a murder is committed. We can number its failures. But we cannot number its successes. No one can ever know how many people have refrained [if any] from murder because of the fear of being [executed]."

Most of the arguments favoring or objecting to capital punishment resort to statistical studies and analysises of the deterrent effect of such a penalty. Mr. Justice Marshall in Furman v. Georgia, 408 U.S. 238, 354 (1972), concluded, based upon the massive amount of evidence placed before this Court, that capital punishment could not be justified on any deterrent effect. Two of Mr. Justice Marshall's important points should be noted since they form the basis of the argument favoring

the death penalty. Citing Sellin's report to the American Law Institute, Furman v. Georgia, 408 U.S. 238, 348 n. 98 (1972), it was noted that first, the use of capital punishment deters men so effectually from committing crimes that a society could not be without such a penal objective; and second, without a death penalty in force there could be no deterrence to a criminal serving a life sentence from murdering a fellow inmate or guard. Mr. Justice Marshall relying upon Sellin's report, in Furman, supra, proposed the hypothesis that,

> "murders should be less frequent in states that have the death penalty than in those that have abolished it, other factors being equal." (p. 349)

The statistics relied upon demonstrated no correlations between the murder rate and the presence or absence of the death penalty sanction. It was even noted that the abolition and reintroduction of the penalty had no effect upon the rate. Mr. Justice Marshall in Furman v. Georgia, 408 U.S. 238, 352 (1972), also observed that the effect of the death penalty upon the murder rate in prisons was virtually nile, Furman, supra, n. 117.

Since the use of capital punishment cannot satisfy any of the above permissible penal objectives as the legitimate end of criminal punishment which cannot be satisfied by a less restrictive means, the State of Arkansas does not have a compelling interest that will allow the infringement of the Petitioner's fundamental right to be protected from cruel and unusual punishments under the Eighth Amendment to the United States Constitution and the Petitioner's fundamental right to life under the Fourteenth Amendment to the United States Constitution. Therefore, the sentence of death by electrocution pronounced upon the Petitioner pursuant to Ark. Stat. Ann. §41-4706 should be declared unconstitutional by this Court.

III

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ELECTROCUTION METHOD OF EXECUTION IMPOSED UPON PETITIONER IS IN VIOLATION OF THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The Eighth Amendment to the United States Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This Amendment has been made applicable to the states through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660 (1962).

The New York Legislature altered their statutory method of execution from hanging to electrocution on January 1, 1889. William Kemmler, who was to be the first man executed under the new law, requested a state writ of habeas corpus contending electrocution violated the New York Constitution's prohibition against "cruel and unusual punishments" (Section 5, Art. 1) and the Fourteenth Amendment of the United States Constitution.

The county judge's dismissal of the writ of habeas corpus was sustained by the Supreme Court of New York holding that the courts had no authority to review the legislature's determination that electrocution was not a cruel punishment. In Re Kemmler, 7 N.Y.S. 145 (1889). The New York Court of Appeals also affirmed on the narrow, technical ground that "(t)he determination of the legislature that the use of electricity as an agency of death constituted a more humane method of executing the judgment of the court in capital cases was ... conclusive." In Re Kemmler, 136 U.S. 436, 443 (1890). The New York Court of Appeals also held that expert testimony concerning electrocution was not admissible to challenge the constitutionality of the punishment statute. "If it cannot

be made to appear that a law is in conflict with the constitution, by argument deduced from the language of the law itself, or from matters of which a court can take judicial notice, then the act must stand." In Re Kemmler, supra, at 443.

Upon writ of error, the United States Supreme Court explicitly rejected any relevance of the Eighth Amendment to electrocution as the proposed method of punishment. "It is not contended, as it could not be, that the Eighth Amendment was intended to apply to the States..." In Re Kemmler, supra, at 446. The court also refused to examine the merits of electrocution in regard to the state constitutional prohibition against cruel and unusual punishment. "The decision of the state courts sustaining the validity of the act under the state constitution is not re-examinable here, nor was that decision against any title, right, privilege, or immunity specially set up or claimed by the Petitioner under the Constitution of the United States." In Re Kemmler, supra, at 447.

Therefore, although the court denied Kemmler's application for writ of error, it did not consider the constitutionality of electrocution in relation to either the state or federal prohibitions against cruel and unusual punishment.

The only other Supreme Court case dealing with electrocution as the particular method of execution is, Louisiana v. Resweber, 329 U.S. 459 (1947). In Resweber, the Petitioner had been sentenced to death by electrocution after being convicted of murder. At the appointed time electricity was passed through his body, but because of a malfunction in the apparatus, it was not sufficient to electrocute him. The Petitioner argued that his having to go through the electrocution procedure twice constituted unnecessary cruelty, in violation of the due process clause of the

Fourteenth Amendment. The Supreme Court, in a 5 to 4 decision, affirmed the Louisiana Supreme Court's denial of a Writ of Certiorari. The issue which divided the majority and minority involved the question of whether the fact that the State's conduct in bungling the execution was unintentional should protect the practice from unconstitutionality. The majority felt that it should, distinguishing the case at bar from a situation where the method itself was inherently cruel. The majority said that here the method used was a humane one, and that the Petitioner's suffering resulted from an unforseeable accident not unlike that which would be involved had there been an accidental fire in his cell block.

The four dissenters in Resweber, supra, speaking through Mr. Justice Burton, felt that whether or not the Petitioner suffered was controlling, saying:

> "In determining whether the proposed procedure is unconstitutional, we must measure it against a lawful electrocution. The contrast is that between instantaneous death and death by installments--caused by electric shocks administered after one or more intervening periods of complete consciousness of the victim. Electrocution, when instantaneous, can be inflicted by a state in conformity with due process of law." Louisiana v. Resweber, 329 U.S. 459, 474 (1947).

In neither In Re Kemmler nor Louisiana v. Resweber was electrocution examined in relation to the Eighth Amendment's prohibition against cruel and unusual punishments as is now required per Robinson v. California, 370 U.S. 660, (1962). Therefore, the constitutionality of electrocution as a method of execution in the face of the Eighth Amendment is a question of first impression for the United States Supreme Court.

However, Resweber is helpful in that it delineates the bounds beyond which a punishment for a capital offense will violate due process.

> "The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to

no more than that of death itself. Electrocution has been approved only in a form that eliminates suffering." Resweber, supra, at 474.

These decisions clearly indicate the constitutionality of the electrocution method is based on the premise that it results in instantaneous and painless death, or that at the least it reduces suffering to a minimum. There is now substantial information which casts very strong doubt as to the validity of this premise.

Lewis E. Lowes, the former warden of Sing Sing Prison, witnessed 115 electrocutions. He described a typical execution as follows:

> "As the switch is thrown into its socket there is a sputtering drone, and the body leaps as if to break the strong leather straps that hold it. Sometimes a thin wisp of smoke pushes itself out from under the helmet that holds the head electrode, followed by a faint odor of burning flesh. The hands turn red, then white, and the cords of the neck stand out like steel bands. After what seems an age but is, in fact, only two minutes, during which time the initial voltage of 2,000 to 2,200 an amperage of 7 to 12 are lowered and reapplied at various intervals, the switch is pulled and the body sags back and relaxes, somewhat as a very tired man would do." (J. Joyce, Capital Punishment: A World View, 168-69 (1961)).

James V. Bennett, an officer of the Justice Department at the time of the Rosenberg execution, described the event as follows:

> "At 8:20 p.m., we were told it was all over, and we dispersed. Not until the following morning did I lean that the execution had been a rough one and that electrical currents had been passed through Mrs. Rosenberg for seven minutes until she was dead. Witnesses said a spiral of smoke went up from her head." Capital Punishment, McCafferty, Aldine-Atherton, N. Y., 1972, p. 156, reprinted from I Chose Prison, James V. Bennett, Alfred Knopf, Inc. 1970.

Rex Thomas, an Associated Press writer, who has probably witnessed more electrocutions than anyone in Alabama, described an interview with a prison officer:

> "Guards have been known to 'go all to pieces' during episodes such as these. 'Some just can't take it.' 'Their nerves just don't hold up'."

> "The guards are always nervous before and during an electrocution," said [officer] Alford. "In my opinion it's something you never become accustomed to. It's the most gruesome job I've come in contact with during my 35 years with the department." Capital Punishment, McCafferty, supra, p. 255, reprinted from Sol Rubin's article in Crime and Delinquenty, Vol. 15, No. 1, January, 1969, pp. 121-131.)

Even more horrifying are descriptions of bungled executions. Robert G. Elliott, electrocutioner of 387 men and women in New York and other Northeastern states, described the following incident:

> "'Don't kill me! Don't do it! Don't do it!' he cried.
>
> The guards dragged the frightened man across the floor and forced him into the chair. He contin[illegible] moaning and resisted attempts to adjust [illegible]e straps. I bent down to fasten the lower electrode, but he kicked so vigorously that I had to appeal to a guard to hold the leg still. With his help, I managed to push up a piece of slit trouser and attach the cold, wet electrode.
>
> White struggled against his bounds, and mumbled incoherently until Davis threw the switch. Even then he tenaciously clung to life, six shocks being necessary before he was pronounced dead.
>
> One of the physicians who listened with a stethoscope after the fourth contact and reported that White's heart was still beating was Dr. Ulysses B. Stein, of Buffalo. When the fifth shock was administered, he fainted and pitched forward from his front row seat to the hard floor. I helped to carry the unconscious doctor from the death chamber into another room, where he was soon revived. This, together with White's behavior, and a gurgling in his throat while the current was on (caused by air escaping from the lungs), horrified many of the spectators. They fairly ran out into the open when permitted to leave." Agent of Death, Robert G. Elliott, Dutton & Co., N. Y., 1940, pp. 66-67.

Another example is the following:

> "Then the electrocutioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: 'Take it off. Let me breath.'" Louisiana v. Resweber, 329 U.S. 459, 480, f. n. 2, -- affidavit of witness to the unsuccessful execution of the petitioner.

There is also available a description of William Kemmler's death in which the prisoner was found to be still alive after seventeen seconds of current. George Westinghouse was quoted as saying:

> "It has been a brutal affair. They could have done better with an axe." Scientific American, 228:45, April 4, 1973.

The data presented above clearly casts doubt as to the instantaneousness and painlessness of the electrocution method. It indicates that electrocution is not a method which reduces human suffering to a minimum.

Because of the documented pain and suffering inherent in an electrocution, this method of execution cannot even meet the due process test of constitutionality enunciated in Resweber "that punishment shall be reduced, as nearly as possible, to no more than that of death itself." Louisiana v. Resweber, 329 U.S. 459, 474 (1947). Although an effective and painless euthanasia drug might not have been available when the New York Legislature adopted electrocution as "the most humane and practical method known to modern science of carrying into effect the sentence of death...," In Re Kemmler, 136 U.S. 436, (1890) there is no lack of this type of drug now. Note, 39 Albany L. Rev. 826, 1975; Note, 60 J. Criminal Law, Criminology and Police Science 351 (1964). Since the state has mandated that certain acts be punishable by death and not "painful death" §§41-1501 Ark. Crim. Code (1976), any unnecessary infliction of pain or suffering upon a condemned man is neither authorized by statute, nor could it be in the face of the Eighth and Fourteenth Amendments. Louisiana v. Resweber, 329 U.S. 459, 463 (1947).

It is now well established that the Eighth Amendment's prohibition against cruel and unusual punishment is not limited to those punishments thought to be excessively cruel at the time of the adoption of the Amendment, but instead

include punishments which a changing society comes to regard as barbarous. Weems v. United States, 217 U.S. 349, 373 (1910). This interpretation of the Eighth Amendment was further supported by this Court's opinion, per Chief Justice Warren, in Trop v. Dulles, 356 U.S. 86 (1958), a case holding that a punishment of loss of citizenship was cruel and unusual, and hence, unconstitutional. "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop, supra, at 101. In light of changing societal mores and improved scientific methods, the Eighth Amendment prohibits execution by electrocution as it does any infliction of unnecessary pain or torture in the execution of any sentence.

The foundations of American justice rest upon three inalienable rights of a free people--life, liberty, and the pursuit of happiness. These fundamental rights were enshrined in the Declaration of Independence and protected by their specific inclusion in the Fifth and Fourteenth Amendments of the United States Constitution. Furthermore, several other amendments provide more specific legal safeguards other amendments provide more specific legal safeguards and procedures (right to a speedy trial by jury of peers, right to counsel, right to confront and cross-examine prosecution witnesses, etc.) designed to ensure that the fundamental right to life cannot be abridged absent due process of law.

Because of its historic stature and its basic nature which encompasses "the right to have rights" Trop v. Dulles, 356 U.S. 86, 102 (1958), there can be little doubt that life is a fundamental right "explicitly or implicitly guaranteed by the Constitution." San Antonio Independent Scho. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

Any infringement of the fundamental right to life is subject to the same "strict scrutiny" as are infringements

of other fundamental rights of Americans, i.e., right to procreation, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); right to vote, Reynolds v. Sims, 377 U.S. 533, 562 (1964); right to interstate travel, Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The state must carry a heavy burden of demonstrating that its infringement of the fundamental right is "necessary to promote a compelling governmental interest." Shapiro v. Thompson, supra, at 634. Even after the State has proven its compelling governmental interest, it must demonstrate "...that the State, in pursuing legitimate objectives, has chosen means which do not unnecessarily infringe on constitutionally protected interests." Memorial Hospital v. Maricopa County, 415 U.S. 250, 269 (1974).

Earlier in this petition, it is argued that no such compelling state interest exists to justify capital punishment, or alternatively, that capital punishment is not the least restrictive method of furthering a compelling State interest. In this section of the petition, it will be assumed, without admission that the State has justified the use of capital punishment by a compelling state interest. Now it is incumbent upon the State to justify its method of execution in light of the Petitioner's fundamental right to life.

Because the right to life is such a fundamental right, the deprivation of that right, even if in accordance with due process of law, must be acocmplished by the least onerous method possible. Where a less restrictive or onerous means to further a compelling state interest is available, the State may not constitutionally abridge a fundamental right by use of a method more harmful to the fundamental right, NAACP v. Button, 371 U.S. 415 (1963).

The earlier data upon electrocution as a means of execution clearly indicates its painful, even tortuous,

nature and demonstrates the onerous burden electrocution places upon the extinction of a condemned man's fundamental right to life. Less onerous methods to accomplish the State's compelling purpose clearly now exist and are available to the State for an alternative which is less restrictive upon Petitioner's fundamental rights. Alternative methods include application of euthanasia drugs such as potassium chloride, morphine, and other anesthetics and central nervous system depressants. Although there is no drug, and indeed, "no method available that guarantees an immediate and painless death," Furman v. Georgia, 408 U.S. 238, 287 (1972) (Brennan, J., concurring) these euthanasia drugs certainly offer a less painful and hence less onerous burden upon a condemned man than electrocution. Because there is a less restrictive means available to the State to further its asserted compelling State interest, the more onerous method of electrocution is unconstitutional. Memorial Hospital v. Maricopa County, 415 U.S. 250, 269 (1974).

The electrocution method of execution has been shown to be unconstitutional both because it violates the Eighth Amendment's prohibition against cruel and unusual punishment and because electrocution is not the least restrictive method available in furthering the State's alleged compelling State interest denigrating Petitioner's fundemantal right to life. "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence." Louisiana Resweber, 329 U.S. 459, 463. If this Court upholds the constitutionality of his death sentence, Petitioner only seeks the protection of the traditional humanity of American law against the unnecessary pain inherent in execution by electrocution.

CONCLUSION

For the reasons stated herein, the judgment of the Supreme Court of Arkansas should be reversed and the cause remanded with directions to set aside the sentence of death of Petitioner.

Respectfully submitted,

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